

The Proposed Amendment of the Comitology Regulation – A Constitutional Perspective

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On Valentine's day, the European Commission [proposed](#) "four targeted amendments" to the Comitology Regulation. In this blogpost it will be argued that while the proposal contains interesting elements, it is largely flawed from an institutional and constitutional point of view.

The world of comitology is arcane and esoteric but also one of huge practical importance for EU law and policy. In line with the German model of Vollzugsföderalismus (executive federalism), EU legislation is normally implemented by the national administrations rather than by an EU administration. Exceptionally however, the Commission may be granted an implementing power in which case it is assisted by committees of national experts (hence comitology) to which the Commission must submit its draft implementing acts for advice, as worked out in the [Comitology Regulation](#).

[According to the Commission](#), comitology has generally continued to run smoothly following the Lisbon Treaty's reform. It performs sub-optimally only in one type of cases, namely the decisions which the Commission has to adopt pursuant to the comitology examination procedure on EU authorizations for the placing onto the market of certain products. This is problematic for those products that are controversial (e.g. GMO's, biocides): in order for the examination committee or (at the second level) the appeal committee to adopt a clear position (in favour or against authorization), a qualified majority among the Member States is required. Typically such a majority cannot be achieved given the dividedness of the Member States. The Commission then has the freedom to adopt (or not) the draft implementing act which it had initially proposed to the committee. The Commission's current practice to grant authorizations in case the committee does not provide a negative or positive opinion puts it in a vulnerable position: a majority (but not a qualified majority) of Member States and important parts of the public opinion may be against authorization, but the Commission is obliged to adopt a decision.

For the authorization to cultivate GMO's the problem was 'solved' by keeping the comitology procedure intact but by allowing the Member States to subsequently [unilaterally ban the cultivation](#) of an EU-authorized GMO on their territory. Under the present proposal, the Commission puts forward a horizontal approach by amending the comitology regulation itself. More concretely, the Commission proposes to:

1. change how the qualified majority is calculated in the appeal committee by only taking into account votes for or against (i.e. Member States that are present but abstain are deemed not to have participated in the vote);
2. introduce a second appeal (following a first appeal to the appeal committee) whereby the appeal committee would be composed of representatives at ministerial level (the regulation currently prescribes that the appeal committee meets at the 'appropriate level', leaving a choice to the Member States);
3. make the voting behaviour of the Member States in the appeal committee public;
4. provide the Commission with a possibility to ask a non-binding opinion from the Council in case the appeal committee cannot adopt an opinion.

Daniel Guéguen has already placed [serious question marks](#) over the practicability of the proposal. While a redefinition of the qualified majority and especially the increased transparency in the appeal committee should not be dismissed out of hand, the Commission's proposal appears especially flawed for reasons touching on the constitutional foundations of comitology.

Firstly it should be emphasized that the Commission is proposing an amendment to the comitology regulation, one of the EU's organic laws (which effectively ranks above 'ordinary' secondary legislation). The Commission proposes fundamental changes to the examination procedure (especially points 2 and 4) to address a problem of

implementation that only poses itself in a very limited number of cases. As the Commission itself argues, the examination procedure works smoothly in the vast majority (98%) of cases (the sledgehammer and the nut come to mind). Further, the Commission in its proposal emphasizes the targeted nature of the amendments, in an obvious attempt to pre-empt the two legislative branches from proposing further amendments. Whether the Commission will be successful seems doubtful in light of the critical observations which the Parliament has made [in the past](#) in relation to the functioning of the post-Lisbon comitology regime.

Secondly, the Commission's proposal suggests the institution is undergoing an identity crisis. The Commission seems to view itself as a technocratic body which lacks the political legitimacy to take politically controversial decisions such as the authorization of a GMO or a substance such as glyphosate. This is at odds with the statements of President Juncker in his [2015 State of the Union Speech](#) when he made clear that he "wanted to lead a political Commission. A very political Commission." It is further at odds with the expectations of the [European Parliament](#) which on 16 February 2017 voted for "transforming the Commission into the principle executive authority or government of the Union." Lastly, even under the current framework, the Commission has the political legitimacy and legal possibility to change its original draft implementing acts if it feels that it is insufficiently backed by the Member States. The European Ombudsman's [decision](#), relied upon by the Commission to show the necessity of its proposal, simply confirms that the Commission is under an obligation to adopt a decision and that it [cannot keep a procedure in limbo](#). It in no way pre-empts the substance of the decision.

Finally the Commission essentially proposes to further undo the Treaty of Lisbon's reform in the area of comitology. As has been argued [elsewhere](#), the Treaty reform has already been reversed or impeded by the European courts in cases such as [Biocides](#), [Visa reciprocity](#), [Netherlands v. Commission](#), [Spain v. Council](#), [Short-selling](#), etc., and by the political institutions in i.a. the 2016 [Common Understanding on Delegated Acts](#). By proposing to involve the Council (de facto or de iure) in the examination procedure, the Commission goes against one of the most fundamental innovations brought by the Lisbon Treaty: by distinguishing delegation (Article 290 TFEU) from implementation (Article 291 TFEU) the Treaty legislator recognized that both functions have different implications for the EU's constitutional order of competences. In the system of Vollzugsföderalismus it is the Member States, but not the EU Council or Parliament, that are affected in their competences when the Commission exercises implementing powers. Hence, Article 291 TFEU clarified that it would only be the Member States that assist or control the Commission under Article 291 TFEU. By proposing to re-introduce the Council in comitology procedures, the Commission ignores the constitutional premises underlying Articles 290 and 291 TFEU. In addition, the amendments would also re-introduce the pre-Lisbon discrimination between the two branches of the EU legislature which made the Parliament contest the comitology system for decades. It seems hard to believe that the Parliament would simply accept such a discrimination, not to mention that the Commission, by exclusively focusing on involving the Council, seems to imply that the Parliament, unlike the Council, lacks the necessary political legitimacy.

Evidently the Commission is concerned by the surge in euroscepticism in European societies. It is doubtful however whether the best way for the Commission to counter 'Brussels-bashing' is to renounce all political responsibility for authorizing controversial products, shifting responsibility to the Council. It further remains to be seen what happens to the proposal in the legislative negotiations and whether the amendments will produce the desired effects in practice. In any event the proposal marks another dubious step in the deconstruction of Lisbon's reform of comitology.

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